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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Petitioner,

vs.

AUGUSTINE PONCE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do Sections 302(c)(5) and 302(e) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §186(c)(5) and 185(e), vest federal district courts with the authority to review eligibility and benefit provisions of a multiemployer pension plan for "reasonableness" when such provisions do not violate any explicit provision of federal or state law?

2. In finding that pension eligibility requirements and benefit levels promulgated by a multiemployer pension plan were "unreasonable," though not violative of any specific federal or state law, did the trial court ignore this Court's ruling in *United Mine Workers v. Robinson*, 455 U.S. 562, 570 that Section 302(c)(5) of the LMRA "hardly embodies [a] reasonableness requirement"?

3. In reviewing the eligibility requirements and benefit levels of a multiemployer pension plan promulgated by collective bargaining parties, did the trial court impermissibly usurp the authority granted to the trustees of the plan by the collective bargaining parties in contravention of this Court's holding in *United Mine Workers, etc., v. Robinson*, 455 U.S. 562 (1982)?

4. In requiring the trustees of a multiemployer pension plan to present a "substantial and verifiable justification" for the plan's eligibility and benefit provisions, did the trial and appellate courts impermissibly encroach upon the collective bargaining parties' freedom to reach solutions of their own choosing to issues arising in a collective bargaining context, in violation of this Court's holdings in *Ford Motor Co. v. Huffman*, 345 U.S. 681 (1953) and *H.K. Porter Company v. NLRB*, 397 U.S. 99 (1970)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Construction Laborers Pension Trust for Southern California respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 26, 1986.

I.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 774 F.2d 1401. The order of that Court denying the Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix B, *infra*) filed February 26, 1986, is not reported. The opinion of the U.S. District Court (Appendix C, *infra*) is reported at 582 F.Supp. 1310. The prior opinion of the U.S. Court of Appeals for the Ninth Circuit (Appendix D, *infra*) is reported at 628 F.2d 537.

II.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on October 25, 1985. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and was denied on February 26, 1986.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

This Petition is timely filed with this Court under the provisions of 28 U.S.C. Section 2101(c).

III.

STATUTORY PROVISIONS INVOLVED

The statutory provisions immediately involved in this action are:

A. 29 U.S.C. Section 302(c)(5);

B. 29 U.S.C. Section 302(e);

C. 29 U.S.C. Section 185(a).

These statutory provisions are reproduced at Appendix E, *infra*.

IV.

STATEMENT OF THE CASE

These consolidated actions seek relief on behalf of individual plaintiffs and class members who last worked as unionized construction laborers in Southern California prior to January 1, 1976. Plaintiffs allege that they each worked ten years or more in "covered employment." However, they are ineligible to receive benefits from the Construction Laborers Pension Trust for Southern California ("CLPT") because they failed to accumulate at least fifteen years' credited service prior to retirement as required by the provisions of the pre-1976 Pension Plan of the CLPT.

The CLPT is an irrevocable trust established June 15, 1962, pursuant to a written Declaration of Trust executed by the Southern California District Council of Laborers (the "Union"), certain affiliated local unions, and certain employers associations with which the Union engaged in collective bargaining.

The CLPT was formed pursuant to, and is governed by, the provisions of Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended ("LMRA") 29 U.S.C. § 186(c)(5). The CLPT derives its revenues from contributions made by employers bound to collective

bargaining agreements requiring such contributions; employees contribute no funds to the CLPT.

The CLPT is administered by a sixteen-member Board of Trustees. One-half the members of the Board of Trustees are designated by the Union; the remaining half of the Trustees are designated by the employers. The settlors of the CLPT, by resolution dated October 16, 1962, empowered the Board of Trustees of the CLPT to promulgate rules and regulations to govern eligibility for pension benefits, and to set pension levels.

On December 27, 1962, the Board of Trustees of the CLPT adopted a Pension Plan which imposed a "15-year Credited Service Requirement" as a condition of eligibility to receive pension benefits. The requirement was set forth in the Pension Plan as follows:

> "The minimum period of work in employment covered by the Plan required to be completed by an employee claiming any kind of pension is 15 years. In addition, the minimum period of employment required to secure a vested or nonforfeitable right to a deferred pension benefit is similarly 15 years . . ."

The "15-year Credited Service Requirement" remained in effect through the end of 1975.[1] Construction laborers who failed to complete 15 years of credited service, including the plaintiffs, were denied pension benefits.

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[1] During the period prior to 1976, many multiemployer pension plans required 15 or more years of credited service to qualify for a pension. Such requirements were considered facially valid; indeed, in *Tomlin v. Board of Trustees*, 586 F.2d 148 (9th Cir. 1978), the Court of Appeals found the same 15-year credited service requirement challenged in this case to be presumptively valid.

In 1970, the Trustees of the CLPT, anticipating a large increase in employer contributions, voted to significantly increase benefits; the Board of Trustees elected to make no change in the 15-year credited service requirement at that time.

Plaintiffs in the present actions challenge the "15-year Credited Service Requirement" as applied to pre-1976 retirees on the ground that it is "arbitrary and capricious" and constitutes a "structural defect" in the Pension Plan when considered in light of (1) the percentage of CLPT participants who actually received pensions and (2) the level of pension benefits available to participants who ultimately received pension benefits.[2] Plaintiffs claim that application of the "15-year Credited Service Requirement" violates Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5).

The trial court entered summary judgment in favor of the CLPT in the *Ponce* action in 1979; the decision was appealed to the U.S. Court of Appeals for the Ninth Circuit; that court reversed the trial court judgment in part (*Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537 (9th Cir. 1980) ("*Ponce I*")), holding that the case raised triable issues of fact which precluded summary judgment on the question of whether the "15-year Credited Service Requirement" was legal.

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[2] The eligibility provisions of the CLPT were revised, effective in 1976, to conform to the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. The minimum eligibility standards prescribed by ERISA are not retroactive; *see* 29 U.S.C. Section 1051(b)(2), and therefore have no application to the claims of the plaintiffs, who retired prior to 1976.

Following remand, the trial court consolidated the *Ponce* action with the *Harrison* case. The actions were ordered bifurcated for separate consideration on the questions of liability and remedy. Trial on the issue of liability was held before the U.S. District Court, sitting without a jury, in January and February, 1983. On March 23, 1984, the U.S. District Court entered its "Judgment in Re Liability," finding that the CLPT and its Board of Trustees acted arbitrarily and capriciously in enforcing the "15-year Credited Service Requirement" prior to January 1, 1976. The trial court found that the pre-1976 Pension Plan excluded an "unusually high" number of participants from receiving benefits while granting generous benefits to those who did qualify. (*Ponce v. Construction Laborers Pension Trust*, 582 F.Supp. 1310 (C.D. Cal. 1984) ("*Ponce II*").)

The trial court certified the case for an immediate interlocutory appeal on the liability issue and the Ninth Circuit agreed to hear the interlocutory appeal, pursuant to the provisions of 28 U.S.C. Section 1292(b). Following briefing and argument, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the trial court, (*Ponce v. Construction Laborers Pension Trust for Southern California*, 774 F.2d 1401 (9th Cir. 1985) ("*Ponce III*")). A timely Petition for Rehearing and Suggestion for Rehearing En Banc were filed; the Petition for Rehearing was denied and the Suggestion for Rehearing En Banc was rejected, by an order issued February 26, 1986.

This Petition was timely filed thereafter.

V.

SUMMARY OF ARGUMENT

1. Section 302(c)(5) of the LMRA is an anti-kickback provision of a criminal statute whose "sole purpose . . . is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . .' " *NLRB v. Amax Coal Company*, 453 U.S. 322, 331 (1981); *Arroyo v. United States*, 359 U.S. 419, 425-426 (1959). This Court has recently reiterated that Section 302(c)(5) does not provide statutory authority for the imposition of a federal court's notions of "reasonableness" when reviewing eligibility and benefit provisions of a pension plan which violates no specific provision of federal or state law; *United Mine Workers v. Robinson*, 455 U.S. 562 (1982). Under the Ninth Circuit's reasoning, a trust fund such as the CLPT which is in literal compliance with all of the provisions of Section 302(c)(5) may nevertheless be "structurally deficient" if, in the view of the Ninth Circuit, it "unreasonably" excludes some participants from receiving pension benefits. No decision of this Court supports this proposition.

2. The Ninth Circuit's holding that a "structural defect" exists in a pension trust "when a pension plan excludes a sizeable number of union members with no reasonable purpose behind their exclusion, thus failing to satisfy the requirement that the fund shall be for the 'sole and exclusive benefit' of all employees," conflicts with the statutory history of Section 302(c)(5) and 302(e) of the LMRA and the consistent interpretations of this Court. In the guise of examining a trust for "structural defects" the Ninth Circuit is, in reality, imposing its own notions of

proper eligibility and benefit requirements on a multiemployer pension trust.

3. The CLPT is a product of collective bargaining between employers and unions. The members of the Board of Trustees of the CLPT are designated by the employers associations and the unions, in equal numbers; they can be removed at the pleasure of the collective bargaining parties at any time. Indeed, the Pension Plan itself is a form of collective bargaining agreement; *see Rehmar v. Smith*, 555 F.2d 1362, 1366 (9th Cir. 1976). Absent violation of some explicit provision of federal law, the provisions of the Pension Plan of the CLPT enjoy the same sanctity from judicial interference as any other product of the collective bargaining process.

4. In placing the burden of proof on the Trustees of the CLPT to demonstrate a "substantial and verifiable justification" for the eligibility and benefit provisions of their Pension Plan, the trial court impermissibly encroached upon the parties' freedom to reach collectively bargained solutions to problems involving allocation of financial resources, without judicial interference. *See Ford Motor Company v. Huffman*, 345 U.S. 681 (1953); *H.K. Porter Company v. NLRB*, 397 U.S. 99 (1970). The fact that the Trustees, rather than the collective bargaining parties themselves, set the benefit and eligibility requirements, does not detract from the fact that the Pension Plan is a creature of the collective bargaining process.

VI.

REASONS THE PETITION SHOULD BE GRANTED

A. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 302(c) AND 302(e) OF THE LMRA IS IN CONFLICT WITH THIS COURT'S OPINION IN UNITED MINE WORKERS v. ROBINSON AND WITH HOLDINGS FROM OTHER CIRCUITS

In *United Mine Workers v. Robinson*, 455 U.S. 562 (1982) this Court unanimously held that Section 302(c)(5) of the Labor Management Relations Act ("LMRA") does not authorize a federal court to review eligibility provisions of a collectively bargained pension plan for "reasonableness".

In *Robinson*, the Court reversed a decision of the U.S. Court of Appeals for the District of Columbia, which had held that it was arbitrary and capricious for the settlors of a multiemployer pension plan to discriminate between the benefits to be provided to widows of coal miners whose husbands were receiving pensions when they died and widows whose husbands were still working, though they were eligible for pensions, at the time of their death. *Robinson v. United Mine Workers*, 640 F.2d 416 (D.C. Cir. 1981).

In rejecting the argument that Section 302(c)(5) of the LMRA grants courts the right to review the reasonableness of such decisions, this Court stated:

> The Court of Appeals held that the requirement in Section 302(c)(5) that an employee benefit trust

fund be maintained 'for the sole and exclusive benefit of the employees . . . and their families and dependents' means that eligibility rules fixed by a collective bargaining agreement must meet a reasonableness standard. The statutory language hardly embodies this reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of Section 302(c)(5).[3]

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[3] The Court went on to note:

"Just last Term, the Court reiterated that 'the sole purpose' of Section 302(c)(5) is to insure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . ' *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331, 101 S.Ct. 2789, 2795, 68 L.Ed.2d 672 (quoting 93 Cong. Rec. 4678 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, p. 1305) (Legis. His. LMRA). *See Arroyo v. United States*, 359 U.S. 419, 425-426, 79 S.Ct. 864, 868, 3 L.Ed.2d 915. [Additional citations omitted.] The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. . . . All conditions in this section fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees. *None of the conditions places any restriction on the allocation of the funds among the persons protected by Section 302(c)(5).*" 455 U.S. at 570-572. [Emphasis supplied]

Despite the apparent clarity of this ruling, the Ninth Circuit appears to believe that Section 302(c)(5) provides a general license to federal courts to investigate the "reasonableness" ofpension plan eligibility provisions. No opinion of this Court has ever supported the proposition that Section 302(c)(5) is anything more than the Court said it was in *Robinson*: a statute designed to insure that collectively bargained pension trusts not become a source of labor kickbacks.

> "Proponents of this section (Section 302(c)(5)) were concerned that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers. Our interpretation of the purpose of the 'sole and exclusive benefit' requirement is reinforced by the other requirements of Section 302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials. Each of the specific conditions that must be satisfied to exempt employer contributions to pension funds from the criminal sanction is consistent with the non-diversion purpose."

Robinson, supra, 455 U.S. at 572.

Although Section 302(c)(5) of the LMRA appears to only regulate the *structure* of trust funds, the Ninth Circuit has held that a "structural defect" exists in a trust "when a pension plan excludes a sizeable number of union members with no reasonable purpose behind their exclusion, thus failing to satisfy the requirement that the fund shall be for

the 'sole and exclusive benefit' of all employees;" *Ponce I*, *supra*, 628 F.2d at 543, quoting from *Burroughs v. Board of Trustees*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).[4] It is impossible to reconcile this statement with this Court's explicit holding in *Robinson* that "all the conditions in this section fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees. None of the conditions places any restriction on the allocation of the funds among the persons protected by Section 302(c)(5)." 455 U.S. at 572.

The Ninth Circuit seeks to avoid the effect of this Court's holding in *Robinson* by noting that the Pension Plan challenged in these cases is embodied in a separate document, rather than in a collective bargaining agreement signed by the settlors of the Trust. *Ponce III*, 774 F.2d at 1405. The Ninth Circuit noted: "This Circuit has consistently interpreted *Robinson* to have left intact a reasonableness requirement in situations where trustees maintain the independent rule making power not present in *Robinson*." *Id.*

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[4] There is no question that the CLPT meets the literal requirements of Section 302(c)(5). It is (1) an express trust "for the sole and exclusive benefit" of employees and their families and dependents; (2) contributions are held in trust, together with income generated by the Trust, exclusively for pension and disability benefits; (3) the basis for paying benefits is specified in a written agreement; and (4) the Fund is jointly administered by representatives of management and labor.

Despite literal compliance with all of the *specific* requirements of Section 302(c)(5), the trial court and the Ninth Circuit both held that a "structural defect" existed in the CLPT, because of their view that eligibility requirements were excessively stringent and benefits were overly generous.

With all respect, this ruling completely ignores the holding of *Robinson.*

If, as is clear from the language quoted above, Section 302(c) is merely an exception to a criminal statute designed to guard against kickbacks, then it makes no difference whether the Pension Plan is separately stated or is written into the collective bargaining agreement itself.[5] In either case, the statute simply confers no authority on federal courts to review pension plans provisions for reasonableness.

Moreover, the Ninth Circuit's holding simply makes no sense. The Pension Plan *itself* is a type of collective bargaining agreement: *see Rehmar v. Smith,* 555 F.2d 1361, 1366 (9th Cir. 1976).[6] The fact that it is a *separate* agreement promulgated by the designees of the collective bargaining parties is completely irrelevant.

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[5] In *Moore v. Reynolds Metals Company Retirement Program,* 740 F.2d 454 (1984), the Sixth Circuit explicitly rejected the proposition that *Robinson* is limited to pension plans incorporated in a collective bargaining agreement:

> "Moore argues that *Robinson* does not apply because the plan in that case was established pursuant to a collective bargaining agreement whereas the plan involved in this case was created unilaterally by the employer. We find the logic of *Robinson* persuasive in either context:
>
> "Because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits." 740 F.2d at 456-457, quoting *Robinson, supra,* 455 U.S. 562, 575.

[6] "The pension benefit eligibility rules, which Lillian alleges were violated, qualify as a contract between a labor organization and an employer." *Rehmar v. Smith, supra,* 555 F.2d at 1366, citing *Alvares v. Erickson,* 514 F.2d 156, 161 (9th Cir.), *cert. denied,* 423 U.S. 874 (1975).

Furthermore, the fact that the collective bargaining parties have delegated some decisions regarding eligibility matters to the Board of Trustees of the CLPT can make no practical difference. The inescapable fact is that the *collective bargaining parties* appoint the members of the Board of Trustees. If the sitting members of the Board of Trustees should fail to adhere to the wishes of the collective bargaining parties, there can be no serious doubt that they would be promptly removed.[7]

The U.S. Court of Appeals for the Third Circuit shares the petitioner's view of the holding in *Robinson*. In *District Two, United Mine Workers v. Helen Mining Company*, 762 F.2d 1155 (1985) the Third Circuit Court of Appeals, relying solely on *Robinson*, upheld a multiemployer trust fund's requirement that prior approval be obtained from the administrator of the trust fund before certain types of surgery would be considered a covered benefit. The Court

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[7] In a very recent decision, the U.S. District Court for the District of Connecticut voided a resolution passed by the Board of Trustees of the Local 145 Health Services and Insurance Fund which would have required "proper and just cause" for the removal of any trustee. The court found that the "proper and just cause" requirement impermissibly interfered with the absolute right of management and labor to remove their designated trustees at any time. *Teamsters Local 145, et al. v. Kuba, et al.*, ___F.Supp___, *(D. Conn. No. B86-36 (JAC), March 19, 1986)*.

The illusory distinction between the setting of eligibility requirements by the collective bargaining parties and the delegation of this authority to a board of trustees becomes obvious when one considers that the collective bargaining parties could, if they wished, simply incorporate the pension plan as a portion of future collective bargaining agreements. This power, together with the power to appoint and discharge the members of the board of trustees, gives the collective bargaining parties clear, though indirect, control over all eligibility and benefit provisions of the trust fund.

rejected plaintiffs' contention that *Robinson* was limited to specific eligibility requirements promulgated in a collective bargaining agreement:

> [W]e reject appellees' attempt to distinguish *Robinson* from this case on the argument that *Robinson* only precludes review of collectively bargained eligibility requirements themselves under a reasonableness standard. We do not read it so narrowly. Instead, we believe that it follows from *Robinson* that when the trustees have consistently and literally followed an unambiguous benefit eligibility requirement that was bargained for and that was set forth in an employee benefit plan, that action cannot be called arbitrary and capricious by a court unless the enforcement would violate federal law or policy." 762 F.2d at 1160.

Based on *Robinson*, the Court held that the trial court had no authority "to examine the reasonableness of the prior approval requirement." 762 F.2d at 1160. The Third Circuit stated:

> "While there is some logic to the district court's conclusion, after *Robinson* the inquiry into the reasonableness of such a provision is no longer permissible." 762 F.2d at 1160.

Similarly, in *Short v. United Mine Workers of America 1950 Pension Trust*, 728 F.2d 528 (D.C. Cir. 1984), the District of Columbia Court of Appeals held that *Robinson* precluded the court from second-guessing the implementation of a resolution by the board of trustees of a multiemployer pension trust which would result in loss of pension benefits for certain non-vested participants. The eligibility rules had been promulgated by the collective

bargaining parties, but were actually implemented by a board of trustees, which adopted a succession of eligibility resolutions. 728 F.2d at 530. The board of trustees retained authority to make necessary changes "to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law and the regulations issued thereunder . . . " 728 F.2d at 536, n.13.

The U.S. Court of Appeals for the First Circuit has squarely rejected the Ninth Circuit's view that Section 302(e) of the LMRA is a vehicle for engaging in broad-scale inquiries into the operation of multiemployer trust funds. In *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1968), the court noted:

> "We are, however, persuaded that the weight of reason and authority compels a narrow reading of Section 302(e). In the first place, its language limits federal courts 'to restrain violations of this section.' These violations, if we read correctly, are violations of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund . . . We see no room for enjoinable violations which are not at the same time Section 302 crimes."

Of course, there are no "crimes" alleged in the present case. The entire case turns on a trial court's decision that the plaintiffs' view of "reasonable" pension plan provisions is more compelling than that of defendants.

The Second Circuit has also disagreed with the Ninth Circuit's expansive view of Section 302:

> "Plaintiff argues . . . that the quoted language [of Section 302(c)(5)] coupled with the jurisdictional grant in Section 302(e), confers on the federal

> courts the power to create a federal common law governing the management of pension plans. [Citation omitted]. We have considerable doubt about this proposition. The length and detail of the Employee Retirement Income Security Act [ERISA], 29 U.S.C. Section 1001, *et seq.*, indicate that the regulation of pension funds with regard to such matters as vesting and procedural rights is a complex task more appropriate for Congress than for the courts. The careful attention paid by Congress in that recently enacted statute to the problem of effective dates and coverage makes us hesitate to conclude that the courts have long been authorized, via the fifth exception to a criminal statute, to create obligations similar to those of ERISA." *Lugo v. Employees Retirement Fund*, 529 F.2d 251 (1976).

Petitioner recognizes that the trustees of a collectively bargained pension trust have fiduciary duties requiring them to act in the sole interests of plan participants, and to guard the corpus of the trust from diversion or waste; *see* generally, *NLRB v. Amax Coal Company*, 453 U.S. 322, 329-32 (1981). In the present case, no one has asserted that the Trustees of the CLPT have breached any of these traditional fiduciary obligations. The plaintiffs and the lower courts have only challenged the eligibility provisions contained in the pre-1976 Pension Plan, when considered in light of the level of benefits paid to qualifying retirees, a claim which goes beyond breach of traditional fiduciary duties.

Some indication of how arbitrary the courts themselves can be in applying the vague standard of "reasonableness" can be seen from the Ninth Circuit's own decision in

Miranda v. Audia, 681 F.2d 1124 (1982). In *Miranda*, the Ninth Circuit upheld a 15-year credited service requirement in a sister trust fund (the Construction Laborers Pension Trust for San Diego County) even though the requirement operated to exclude an even higher percentage of plan participants from receiving benefits than in the present case. In *Ponce III*, the Ninth Circuit explained this anomaly away by stating that "The *Miranda* trustees' reasons for maintaining a 15-year vesting requirement were different from and more convincing than those of the CLPT." *Ponce III, supra*, 774 F.2d at 1404. The Ninth Circuit seems to be saying that a pension eligibility requirement can be a "structural defect" or not depending on how "convincing" the "reasons" are for its promulgation! This standard makes every pension eligibility requirement fair game for judicial review.

If Congress had intended to include a requirement of "reasonableness" within the structural requirements set forth in Section 302(c)(5), it could have done so. For example, the Labor Management Reporting and Disclosure Act of 1959 requires that union members be given a "reasonable opportunity" to be nominated and elected to office. *See* 29 U.S.C. Section 481(e) and *United Steel Workers v. Usery*, 429 U.S. 305 (1976). The absence of a "reasonableness" requirement in Section 302 is, itself, strong evidence that Congress did not intend courts to roam at will through the provisions of Taft-Hartley pension plans, invalidating every provision of which they do not approve.

The enactment of ERISA does not moot the issue of the interpretation of Section 302(c)(5). The Sixth Circuit has held that substantive provisions of pension plans which meet the minimum requirements of ERISA may not be

reviewed for reasonableness; *see Moore v. Reynolds Metals Company Retirement Program*, 740 F.2d 454, 456 (1984). The Ninth Circuit, however, appears to believe that even post-ERISA pension plans which are otherwise in compliance with ERISA may be reviewed for "reasonableness." *See Music v. Western Conference of Teamsters Pension Fund*, 712 F.2d 413 (1983) [waiting period imposed by pension plan before receipt of disabiliy benefits found to be arbitrary].

The Court should grant certiorari to resolve the conflict among the circuits regarding the meaning of this Court's holding in *Robinson* and the limits of judicial discretion to review pension plan provisions for reasonableness under Section 302 of the LMRA. Compare *Ponce I* and *Ponce III* and *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413 (9th Cir. 1983) with *Moore v. Reynolds Metals Company Retirement Program*, 740 F.2d 454 (6th Cir. 1984) and *District 2, United Mine Workers v. Helen Mining Company*, 762 F.2d 1155 (3d Cir. 1985), *cert. denied* __U.S__ (1986).

B. IN REQUIRING THE TRUSTEES TO ESTABLISH A "SUBSTANTIAL AND VERIFIABLE JUSTIFICATION" FOR THEIR BENEFIT AND ELIGIBILITY PROVISIONS, THE TRIAL COURT AND THE NINTH CIRCUIT PLACED A BURDEN ON THE TRUSTEES NOT JUSTIFIED BY ANY PROVISION OF FEDERAL LAW

In *Ponce I*, the Ninth Circuit held that "When a vesting requirement is shown to exclude an unusually high percentage of plan participants, the burden shifts to the

trustees to show the reasonableness of the requirement." 628 F.2d at 543. The Ninth Circuit stated: "Absent a substantial and verifiable justification, it is arbitrary and capricious for trustees both to maintain a vesting requirement with a high exclusion rate and at the same time to pay an unusually high level of benefits." *Ponce I*, 628 F.2d at 544.

On remand, the trial court found that the CLPT's pre-1976 eligibilty provisions excluded "an unusually high" percentage of participants from receiving pension benefits and shifted the burden of justification to the Trustees. *Ponce II*, 582 F. Supp. at 1317. The trial court went on to find that the Trustees' reasons for establishing the 15-year credited service requirement did not constitute a "substantial and verifiable justification" for the requirement. *Ponce II*, 582 F. Supp. at 1318.

In requiring the Board of Trustees to shoulder an affirmative obligation to demonstrate a "substantial and verifiable" reason for their eligibility benefit provisions, the Ninth Circuit and the trial court have saddled the Trustees with a burden unsupported by any provision of federal law. Indeed, the Ninth Circuit *itself* has recognized in other cases that many benefit and eligibility provisions represent policy judgments, which are simply not subject to objective verification:

> "Other rules [adopted by the trustees] may represent a choice among competing policies or rely on behavioral predictions that are not susceptible to verification . . . Rules that require policy selection or matching of actuarial probabilities to the condition of an industry fall more fully to the trustees' discretion." *Harm v. Bay Area*

Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1306 n. 7 (9th Cir. 1983).

At trial, members of the Board of Trustees explained that the 15-year credited service requirement was adopted by the CLPT at a time when such a service requirement was a common feature of multiemployer pension plans; in that context, the requirement appeared reasonable. The Trustees also testified that they wished to provide good income levels to pensioners and hoped to give laborers an incentive to remain in the industry, rather than move to more lucrative occupations. (*Ponce II*, 582 F. Supp. 1317-1318).

The trial court dismissed the Trustees' reasons, stating that they "fall short of establishing 'a substantial and verifiable justification' for defendant Trustees' decision . . . " *Ponce II*, 582 F. Supp. at 1318.

The reasons advanced by the Trustees of the CLPT are exactly the type of policy decisions which are *not* subject to objective justification and verification.[8] By requiring the

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[8] The present case is distinguishable from those in which trial courts and appellate courts have found that the trustees denied benefits because of improper or ulterior motives; *see*, e.g., *Hurn v. Retirement Trust Funds*, 703 F.2d 386 (9th Cir. 1983) [suspension of pension benefits to unsuccessful candidate for union political office held to be arbitrary and capricious]; *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 460 U.S. 1067 (1983) [cancellation of service credits of employees of company that went non-union was arbitary and capricious]. There is no suggestion in the present action that any political or pro-union motive tainted the eligibility requirements adopted by the Trustees.

The case is also distinguishable from cases such as *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1976) *cert. denied*, 429 U.S. 1096 (1977) in which pension administrators have been found to have violated tenets of fundamental fairness by failing to give proper notice of eligibility requirements.

Trustees to meet an evidentiary standard of objective verifiability, the Ninth Circuit virtually insured that the plaintiffs would win this case.

So far as the Trustees have been able to discover, no case law in any other circuit supports the evidentiary requirements imposed by the Ninth Circuit on the defendants in the present action. The court should grant certiorari to reverse this unwarranted holding.

C. THE AFTER-THE-FACT INVALIDATION OF COLLECTIVELY BARGAINED SOLUTIONS TO ISSUES INVOLVING ALLOCATION OF FINANCIAL RESOURCES VIOLATES THE COLLECTIVE BARGAINING PARTIES' FREEDOM OF CONTRACT

This Court has repeatedly held that collective bargaining parties are free to reach any solution to a collective bargaining issue whch does not violate some explicit provision of federal law; *see H.K. Porter Company v. NLRB* 397 U.S. 104 (1970); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395 (1952).

In *Ford Motor Co. v. Huffman, supra*, this Court unanimously held that collective bargaining parties have wide discretion in allocating economic resources and privileges. The issue in *Ford Motor Co.* was whether it was reasonable for the collective bargaining parties to grant seniority credits for military service, which would have the effect of giving short term Ford employees with military records greater seniority than others with longer employment with Ford. In holding the agreement to be permissible,

this Court noted: "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338. *See* also *Aeronautical Industry District Lodge v. Campbell*, 337 U.S. 521 (1949) [union chairmen entitled to employment security protections not granted to other employees with greater seniority].

Similarly, in *H.K. Porter, supra*, this Court held that a "fundamental premise on which the [National Labor Relations] Act is based" consists of "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." 397 U.S. at 108.

As already noted, the promulgation of a multiemployer pension plan under the provisions of Section 302(c)(5) of the LMRA is simply an extension of the collective bargaining process.[9] The designation of equal numbers of trustees by management and union representatives insures that the traditional balance between management and labor

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[9] A noted commentator has written of the intrinsic link between the collctive bargaining process and the trustees' administration of a multi-employer pension plan:

> "[T]he subjects about which the trustees confer are within the scope of mandatory collective bargaining under the Act. . . . Despite the unusual setting, the deliberations of trustees of these funds may be looked upon as an extension of the collective bargaining process with contractual and statutory limits." Goetz, Developing Federal Labor Law of Welfare & Pension Plans, 55 Cornell Review, 911, 922-23 (1970).

interests is preserved in the promulgation of pension plan provisions.[10] Moreover, the power of the collective bargaining parties to appoint and remove trustees at will insures that the trustees will act in a manner congruent with the desires of the collective bargaining parties.[11]

As a product of the collective bargaining process, the multiemployer pension plan is entitled to the same sanctity as any other collectively bargained instrument. In *H.K. Porter*, this Court quoted with approval from Senator Walsh's comments, at the time of the passage of the Wagner Act, on the inviolability of agreements reached in collective bargaining:[12]

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[10] One circuit court has noted: "Congress envisioned the conflict of views of employer and employee [trustees] as a distilling process which would provide safeguards against trust fund corruption." *Associated Contractors v. Laborers International Union*, 559 F.2d 222, 228 (3d Cir. 1977). *See* also *Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433, 439. n.7 (1980).

[11] The plaintiffs in the *Harrison* case clearly recognize that the collective bargaining parties have ultimate control over the actions of the Trustees. In their Complaint, the Harrison plaintiffs charge that the Southern California District Council of Laborers "has failed by appointing the Trustees of defendant Southern California Trust and by acquiescing in the breaches of fiduciary duty by all Trustees of the Southern California Trust in implementing a Taft-Hartley Pension Plan which fails to provide reasonable benefits for as many persons as possible . . . " (Harrison Complaint, paragraph 43.) Though the plaintiffs recognized that the Union had the power to control trustee decisions through appointment and removal of trustees, the trial court found no evidence that the Union had breached its duty of fair representation to its members. (Conclusions of Law, par. 25.)

[12] One respected commentator has stated that "Freedom of contract has — and, as I think properly — dominated the law of the duty to bargain . . . " Wellington, "*Freedom of Contract and the Collective Bargaining Agreement*," 112 U. Pa. L.R. 467, 478 (1964).

> "The bill [the National labor Relations Act] does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded." Remarks of Senator Walsh, 79 Cong. Rec. 7659 (1935).

The judicial use of undefined concepts of "reasonableness" to review pension eligibility provisions promulgated by pension trustees under authority delegated by the collective bargaining parties is a clear encroachment on the collective bargaining scheme itself.

Any doubt that the legal analysis adopted by the Ninth Circuit in his case trenches upon the rights of the collective bargaining parties should be dispelled by the fact that the relief the plaintiffs seek in this action, if fully iplemented, could easily cost this single Plan in excess of one hundred million dollars, a sum which the Trust can only obtain through the good offices of the collective bargaining parties themselves.

D. CONCLUSION

The petition for writ of certiorori should be granted.

JAMES P. WATSON
CHARLES E. NONEMAN
COX, CASTLE & NICHOLSON

LAW OFFICES OF
LIONEL RICHMAN

KENNETH J. SACKMAN
GILBERT & SACKMAN

By: JAMES P. WATSON
Counsel of Record
for Petitioner

APPENDIX A

Augustine PONCE et al,
Plaintiffs-Appellees,
v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA et al.
Defendants-Appellants.

Lee W. HARRISON, et al.,
Plaintiffs-Appellees,
v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA et al.,
Defendants-Appellants.

No. 84-6216

United States Court of Appeals, Ninth Circuit

Argued and Submitted April 3, 1985
Decided October 25, 1985.

Neal S. Dudovitz, Gill Deford, Bruce Miller, Los Angeles, Cal., for plaintiffs-appellees.

Cox, Castle & Nicholson, James P. Watson, Charles E. Noneman, Los Angeles, Cal., for defendants-appellants.

Appeal from the United States District Court for the Central District of California.

Before GOODWIN, SNEED and SKOPIL, Circuit Judges.

PER CURIAM

Trustees of the Construction Laborers Pension Trust (CLPT) appeal from a district court judgment, 582 F.Supp. 1310, that operation of its trust violates § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5) (1982). We affirm.

The pension plan at issue in this action was put into effect in 1962 by the trustees of the Construction Laborers Pension Trust. When adopted, the plan included a requirement that to be eligible for pension benefits, laborers must have worked in the construction industry for a minimum of 15 credited years. In 1976, following passage of the Employee Retirement Income Security Act (ERISA), this minimum was changed to 10 years. See 29 U.S.C. § 1053(a)(2)(a) (1982). In 1970, the trustees had considered changing their vesting requirement to 10 years, but had decided instead to increase the benefits to those who qualified under the 15-year standard.

Plaintiffs in this action are construction laborers who last worked as laborers in Southern California before 1976. Each worked for at least 10 years, but not 15 years. Because the minimum vesting requirement of ERISA is not retroactive, *see* 29 U.S.C. § 1061(b)(2), plaintiffs are ineligible to receive pension benefits under the (pre-ERISA) CLPT 15-year standard. In 1976, plaintiffs filed a complaint in federal district court, alleging that the 15-year requirement was arbitrary and capricious and thus in violation of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5) (1982). Section 186(c)(5) sets forth the terms under which pension trusts can be established and administered.

The district court granted summary judgment for CLPT in 1979. On appeal, we held that summary judgment was

inappropriate and remanded for trial on the question of reasonableness of the 15-year requirement, in light of the fact that its effect was to deny pension plan participation to 96% of the potentially covered construction laborers. *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543-45 (9th Cir. 1980) (*Ponce I*). On remand, the case was consolidated with a class action based on the same allegations. The liability and damage issues were bifurcated and the liability phase was tried to a judge. In 1984 the judge found that CLPT had violated § 186(c)(5). *Ponce v. Construction Laborers Pension Trust*, 582 F.Supp. 1310 (C.D.Cal.1984) (*Ponce* II). This interlocutory appeal ensued.

I.

EXCLUSION RATE

When this court reversed summary judgment for CLPT in Ponce I, we declined to dictate to CLPT a proper exclusion percentage but suggested that there was a point at which an exclusion percentage was too high, i.e., the point at which the trustees could not justify as reasonable the long vesting requirement. 628 F.2d at 543. We said: "when a vesting requirement is shown to exclude an unusually high percentage of plan participants, the burden shifts to the trustees to show the reasonableness of the requirement." *Id.* The district court's finding on remand that the exclusion rate was excessively high is a finding of a fact to be reversed only if clearly erroneous. *See Miranda v. Audia*, 681 F.2d 1124, 1127 (9th Cir. 1982).

CLPT has posed three reasons the district court wrongly concluded that plaintiffs had shifted the burden to CLPT to demonstrate reasonableness. First, CLPT argues that the

court used the wrong formula to calculate the percentage of workers excluded from the pension plan. Second, it argues that the court should not have admitted into evidence an incomplete Senate Interim Report on Welfare and Pension Plans. Third, it argues that this court's decision in *Miranda*, 681 F.2d 1124, found a higher exclusion rate to be reasonable, and thus that the exclusion rate in this case should be assumed reasonable, with no need to establish reasonableness by defendants.

A. District Court Calculations.

(1) Plaintiffs presented expert testimony that the appropriate pool of potential beneficiaries was all workers on whose behalf employers had made contributions to the trust, whether or not they were "career laborers." The trial court chose to apply this formula rather than the one offered by CLPT, presumably because it found plaintiffs' witnesses more persuasive than CLPT's. That judgment is not clearly erroneous and thus is not vulnerable to reversal. *See W.S. Shamban & Co. v. Commerce & Industry Insurance Co.*, 475 F.2d 34, 36 (9th Cir. 1973).

CLPT did not contradict any of the specific figures which plaintiffs provided to the court. The district court thus had only one set of figures to consider. The district court expressed some hesitation about the precision of plaintiff's statistics, 582 F. Supp. at 1313-15, but in the absence of contrary relevant evidence from CLPT, accepted them as estimates. The final exclusion rate determined by the court was 94.3%. Id. at 1317. This was lower than the figure of 96% provided by plaintiff's expert witness, but was still high enough to be labeled "unusually" high by the court and thus unreasonable. Better figures may exist which would show the district court's factual conclusions to be

clearly erroneous, but CLPT has not produced them at trial or on appeal.

B. Admissibility of the Senate Report.

(2) CLPT maintains that admission of the Senate Interim Report as evidence of a national exclusion rate was prejudicial error. The trial court's admission of the materials is reviewed for abuse of discretion. *M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d 1303, 1310 (9th Cir. 1982).

Federal Rule of Evidence 803(8)(C) permits the admission of public reports "made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." CLPT argues that this particular reort lacks trustworthiness by virtue both of the nature of material compiled and of the manner in which the compilation occurred.

It might have been error for the trial judge to accept the Senate Report statistics as proof of a disputed fact and rely completely upon the report in deciding that the CLPT exclusion rate was unreasonably high. We agree with plaintiffs, however, that the report was not offered as proof of an acceptable exclusion rate, but instead as one source of corroborative evidence for the testimony of one of their experts. The record reveals that the purpose for which the trial court considered the report was well within the court's discretion.

Paragraph 18 of the district court Findings of Fact echoes the Senate Report's conclusion that the average national exclusion rate was 92.5%. 583 F.Supp. at 1314. But the trial court's conclusion that the CLPT rate of 94.3% was unusually high was not based solely on a comparison with that national average. The court said: "In comparison to the average national forfeiture rate (92.5%) and *on its face*, an exclusion rate of 94.3% was unusually high." Id. at

1317 (emphasis in the original). Since both of plaintiffs' witnesses who testified on the question described 94.3% as unusually high, and CLPT did not rebut their testimony, CLPT has not shown that the trial court relied on the Senate Report to the prejudice of CLPT. Admission of the report was not an abuse of discretion.

C. The Impact of *Miranda v. Audia.*

Miranda does not stand for the proposition that exclusion rates of less than 96% automatically are acceptable. Such a holding would contradict the older *Ponce I* refusal to dictate an acceptable exclusion percentage. Rather, the *Miranda* court found that in the case before it, the trustees were able to show that their long vesting period and high exclusion rates were reasonable because of redeeming steps they had taken to relax eligibility conditions. 681 F.2d at 1126-27. The fact that the *Miranda* defendants were able to meet the burden after it shifted to them in no way affects the shifting of the burden to the Ponce defendants to show reasonableness in this case.

II.

REVIEWABILITY OF CLPT'S REASONING

(3) In addition to quarreling with the district court's findings on the exclusion rate of CLPT's pension plan, CLPT believes that the district court did not have jurisdiction to review CLPT's reasoning for maintaining the 15-year vesting requirement, despite the *Ponce I* directive to do so. This is a question of law, subject to de novo review. *United States v. McConnery,* 728 F.2d 1195, 1201 (9th Cir.),

cert denied, 464 U.S. 813, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

(4) There is no question that review of the trustee's rationale is within the district court's jurisdiction. *See, e.g., Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413, 416 (9th Cir. 1983); *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 652 (9th Cir. 1982), *cert. denied*, 464 U.S. 813, 104 S.Ct. 67, 78 L.Ed.2d 82 (1983). There are, however, limitations as to the extent of that review; the court must allow trustees broad discretion. Their decisions will stand unless arbitrary and capricious. *Id.; see also Sailer v. Retirement Fund Trust of the Plumbing, Heating & Piping Industry*, 599 F.2d 913, 914 (9th Cir. 1979).

(5) Once again, CLPT incorrectly relies on *Miranda*. CLPT compares the factual underpinnings in *Miranda* to those here, including facts stipulated in this case which also existed in *Miranda*. CLPT suggests that that because reasonableness was found in *Miranda* on those facts, it must be found here. As we have already said, however, the *Miranda* trustees' reasons for maintaining a 15-year vesting requirement were different from and more convincing than those of CLPT.

The chief justification for the vesting requirement in *Miranda* was the existence of provisions which loosened eligibility requirements despite the high exclusion rate. Those provisions were:

1. Lowering from 65 to 62 the age at which benefits could be obtaned with 15 years of service;

2. Removing retirement age requirements completely for employees with 25 years service;

3. Relaxing standards for curing a "break in service";

4. Establishing national reciprocity agreements under which credited service with one local could be transferred to another.

681 F.2d at 1126.

Two of these provisions, the second and the fourth, were adopted by CLPT between 1962 and 1967.

The district court was instructed by this court to make its findings in light of CLPT's determination in 1970 not only to keep the 15-year vesting requirement but also to increase benefits to those who were eligible. 628 F.2d at 544. CLPT offered the following justifications for its decision:

> a. CLPT's belief that employees who had accrued less than 15 years of credited service were not entitled to pension benefits;
>
> b. CLPT's goal of providing sufficient income to pensioners to enable them to retire in comfort; and
>
> c. CLPT's goal of providing sufficient incentive to qualified employees to reduce employee turnover.

Ponce, 582 F.Supp. at 1318. CLPT maintains that by rejecting its justification for the high exclusion rate, the court substituted its judgment for that of the trustees, and imposed an unwarranted "best possible balance test" instead of examining the standard for reasonableness.

The trial judge dealt with each CLPT justification in turn. The first he dismissed summarily, 583 F.Supp. at 1318, but correctly. The trustees' belief that many people are not entitled to benefits is not the same as a decision to increase benefits to those who are eligible.

With regard to the second and third justifications, the trial judge found that the evidence did not support the

contention that the exclusion rule forwarded CLPT's purported goals. Id. Nor does it; the parties' stipulations and the testimony presented at trial indicate that a number of factors contribute to the industry employment turnover rate. CLPT has not shown that its pension plan successfully has retained "career" laborers who would otherwise have left. In addition, this court has made it clear that providing more income to fewer recipients is not by itself an acceptable goal. *Ponce I*, F2d at 544.

CLPT's burden was to present a creditable justification for its long vesting requirement and high exclusion rate. Neither this court nor the district court would have to go so far as to substitute its judgment for that of the trustees to find CLPT had not met that burden.

III.

APPLICATION OF UNITED MINE WORKERS HEALTH & RETIREMENT FUNDS V. ROBINSON

CLPT's final argument is merely a variation of its position that courts must not second guess the reasoning of trustees. In this version, CLPT urges that under *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982) there is absolutely no reasonableness requirement in 29 U.S.C. § 186(c)(5)(1982). This is an obtuse reading of *Robinson*, particularly in light of recent Ninth Circuit cases which have clearly construed Robinson otherwise.

The Supreme Court granted certiorari in *Robinson* to decide "whether [29 U.S.C. 186(c)(5) authorizes federal courts to review for reasonableness the *provisions of a*

collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund." 455 U.S. at 564, 102 S.Ct. at 1228 (emphasis added). The Court of Appeals for the District of Columbia Circuit had found there was such a requirement. The Supreme Court reversed, explaining that the Court of Appeals had relied on cases in which, unlike in *Robinson*, trustees and not collective bargaining parties had full power to fix the eligibility requirements. Id. at 573, 102 S.Ct. at 1232. This circuit has consistently interpreted *Robinson* to have left intact a reasonableness requirement in stituations where trustees maintained the independent rulemaking power not present in *Robinson*. *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413, 417 (9th Cir. 1983); *Hurn v. Retirement Fund Trust of the Plumbing, Heating & Piping Industry*, 703 F.2d 386, 389 (9th Cir. 1983); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 n.4 (9th Cir. 1983).

CLPT tries to distinguish its situation by pointing out that its trustees sit by appointment, and at the pleasure, of the collective bargaining parties, and that the collective bargaining parties know of and approve all the trustees actions. CLPT has conceded that the eligibility requirement and benefit levels are nonetheless "promulgated by the Board of Trustees," but argues that *Robinson* does not require a showing that the collective bargaining parties have actually instructed the trustees to set particular standards. *Robinson*, however, does draw a line between rules which were the subjet of bargaining and those which were determined by the trustees. 455 U.S. at 569, 575, 102 S.Ct. at 1230, 1232; *see also Hurn*, 703 F.2d at 389.

CLPT has not given any indication that the rules it promulgated were the subject of bargaining. Nor does it

show how its relationship with interested collective bargaining parties is different from the relations present in *Music, Hurn or Harm. Hurn* makes it absolutely clear that even a specific requirement that the trustee's rules be ratified by the collective bargaining parties does not make those rules unreviewable under *Robinson* because "[i]ndependent approval by representatives of each side . . . is not the equivalent of collective bargaining." 703 F.2d at 389.

Affirmed.

APPENDIX B

[FILED
Feb. 26, 1986
CATHY A. CATTERSON,
Clerk
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC Nos.
AUGUSTINE PONCE, et al., C-76-2857 RMT
C-81-0591 RMT
Plaintiffs-Appellees,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, et al.,
Defendants-Appellants.

LEE W. HARRISON, et al.
Plaintiffs-Appellees,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, et al.,
Defendants-Appellants.

O R D E R

Before: GOODWIN, SNEED and SKOPIL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the case en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Augustine PONCE, et al., Nos. CV 76-2856-RMT,

Plaintiffs,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Defendants.

Lee W. HARRISON, et al., CV. 81-591-RMT(PX).

Plaintiffs,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date: March 21, 1984

TAKASUGI, District Judge.

This matter came before the court for trial in February 1983 on the issue of defendants' liability. Having considered all evidence introduced at trial, the argument of counsel and all documents filed herein, and having issued its

Judgment in re Liability, the court now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. All named plaintiffs and members of the plaintiff class in this consolidated action are retired or disabled construction laborers who were members of defendant Southern California District Council of Laborers, who participated in defendant Construction Laborers Pension Trust for Southern Caifornia and who last performed "covered" work under the Master Labor Agreement(s) prior to January 1, 1976.

2. Defendant Southern California District Council of Laborers ("defendant Union") is a labor organization comprised of various local unions located in Southern California and at all relevants times, was the collective bargaining representative for plaintiffs.

3. Defendant Construction Laborers Pension Trust for Southern California ("defendant Trust") is a trust fund established pursuant to a collective bargaining agreement entered into by defendant Union and certain employer-contractors and which has been in effect since June 1962.

4. Defendant Board of Trustees of the Construction Laborers Pension Trust for Southern California ("defendant Trustees") is comprised of individuals selected by the collective bargaining parties to administer and manage defendant Trust.

5. The promulgation and adoption of all eligibility requirements and benefit levels under defendant Trust was within the sole discretion and power of defendant Trustees. Eligibility requirements and benefit levels were neither

established nor mandated by the collective bargaining parties.

6. Between June, 1962 and December 31, 1974, the eligibility provisions of defendant Trust required an employee to accrue a minimum of 15 years of credited service as a prerequisite to obtaining a vested right in or receiving pension benefits.

7. Between 1965 and 1967, defendant Trustees liberalized some of the eligibility and benefit provisions of defendant Trust including:

(a) implementing a national "reciprocity" system;

(b) providing for the payment of a full retirement benefit after 25 years of credited service regardless of age; and,

(c) providing for joint and survivor benefits.

8. On October 21, 1969, defendant Trustees were presented with and rejected without discussion a resolution from Local No. 1119 requesting that defendant Trustees adopt a 5-year credited service requirement.

9. The hourly employer contribution rates into defendant Trust between 1969 and 1974 were as follows:

June 1, 1969 - September 30, 1970	- $0.35
October 1, 1970 - July 31, 1971	- $0.60
August 1, 1971 - April 30, 1972	- $0.85
May 1, 1979 - July 31, 1973	- $1.10
August 1, 1973 - November 30, 1974	- $1.35

10. In 1970, relying upon the expected increases in the employer contribution rates, defendant Trustees determined to increase the monthly benefit factor.

11. In June 1970, defendant Trustees requested their actuarial consultant to study the feasibility of adopting a 10-year credited service requirement with respect to pension benefits. Subsequently, the actuary reported to defendant Trustees that such a modification of the credited service requirement would allow defendant Trustees to adopt a monthly benefit factor of $26.00. The actuary's conclusion was based upon his finding that the withdrawal of the 10- to 14-year employees from employment would no longer produce gains which were then being used to increase the benefit levels of longer service employees.

12. In September 1970, defendant Trustees increased the monthly benefit factor to $32.40 while retaining the 15-year credited service requirement.

13. The reasons allegedly underlying defendant Trustees' decision to increase the monthly benefit factor while retaining the 15-year credited service requirement were:

(a) defendant Trustees' belief that employees who had accrued less than 15 years of credited service were not entitled to pension benefits;

(b) defendant Trustees' goal of providing sufficient income to pensioners to enable them to retire in comfort; and,

(c) defendant Trustees' goal of providing sufficient incentive to qualified employees in order to reduce employee turnover.

14. For purposes of the instant issue, it is assumed that all plaintiffs have accumulatd more than 10 but less than 15

years of credited service during their participation in defendant Trust.

15. All plaintiffs were denied or would have been denied pension benefits on the basis that they had not accrued 15 years of credited service.

16. Approximately 148,219 persons participated in defendant Trust, i.e., had contributions made on their behalf, between June 1962 and December 31, 1974. Clerical errors which resulted in the multiple entry and use of participant names suggest that a downward adjustment of the above figure is warranted. However, no evidence was introduced indicating the extent of such an adjustment or that the adjustment would have an appreciable effect on the 148,219 figure. A valid and reliable approximation of the total number of persons who participated in defendant Trust during the relevant period is 148,219.

17. As of December 31, 1974, 28,424 participants were considered active participants, 6,002 participants had qualified for and began receiving pension benefits, and approximately 823 participants had vested rights to but had not yet begun to receive benefits. Thus, as of December 31, 1974, approximately 35,249 participants had not forfeited their rights to receive pension benefits under defendant Trust. The existence of inactive, unbroken service participants and participants working in other geographic areas under "reciprocity agreements" suggests that an upward adjustment of the above figure is warranted. However, no evidence was introduced indicating the extent of such an adjustment or that the adjustment would have an appreciable effect on the 35,249 figure. A valid and reliable approximation of the total number of participants who, as of December 31, 1974 had not forfeited their rights to receive pension benefits under defendant Trust is 35,249.

18. On a national average, in pension plans which conditioned the right to pension benefits on the accrual of 11 or more years of credited service, the percentage of participants who forfeited their rights to receive pension benefits was approximately 92.5%.

19. The adoption of a 10-year credited service requirement in 1970 would have significantly increased the number of participants who would have vested as to pension benefits, i.e., would have significantly decreased the number of participants who forfeited their rights to receive pension benefits.

20. Between June, 1962 and December 31, 1984, the amount of a monthly benefit payment was calculated by multiplying the years of service earned by a participant (at least 15 years) by a monthly benefit factor.

21. The monthly benefit factors adopted by defendant Trustees between June 1962 and December 31, 1974 were as follows:

(January 1, 1963)	- $ 2.67
(July 1, 1965)	- $ 5.40
(June 1, 1966)	- $11.75
(December 1, 1969)	- $13.75
(October 1, 1970)	- $32.40

22. As of the date of each increase in the monthly benefit factor, the monthly benefit payment to current retirees was adjusted in accordance with said increase.

23. The average monthly benefit and corresponding yearly benefit paid by defendant Trust between 1969 and 1974 were as follows:

(1969)	$231.00	- $2,556.00
(1970)	$588.00	- $7,056.00
(1971)	$596.00	- $7,152.00
(1972)	$597.00	- $7,164.00
(1973)	$585.35	- $7,024.20
(1974)	$567.92	- $6,815.04

24. The average monthly amount of Social Security benefits paid to retired male workers (with and without reduction for early retirement) between 1969 and 1974 were as follows:

	Without Reduction For Early Retirement	With Reduction for Early Retirement	
		Before Reduction	After Reduction
(1969)	$117.78	$109.16	$ 97.06
(1970)	$139.05	$128.89	$115.30
(1971)	$156.39	$144.06	$129.84
(1972)	$192.37	$176.03	$161.04
(1973)	$197.00	$181.00	$164.20
(1974)	$223.55	$205.80	$186.91

25. The approximate yearly amounts of post-retirement income provided to participants through pension benefits and social security (after reduction for early retirement) between 1969 and 1974 were as follows:

(1969)	$3,720.72
(1970)	$8,439.60
(1971)	$8,710.08
(1972)	$9,096.48
(1973)	$8,994.60
(1974)	$9,052.96

26. The base and maximum hourly wage rates for any job classification and the average hourly wage rate for all job classifications under the Master Labor Agreement between 1970 and 1974 were as follows:

	Base Rate	Maximum Rate	Average
(June 15, 1970)	$4.54	$5.07	$4.71
(October 1, 1970)	$4.595	$5.12	$4.76
(May 1, 1971)	$4.995	$5.55	$5.19
(August 1, 1971)	$5.045	$5.595	$5.23
(May 1, 1972)	$5.495	$6.145	$5.70
(May 1, 1973)	$5.945	$6.595	$6.14

27. Plaintiffs' expert witnesses and the actuarial assumptions adopted and utilized by the consultant to defendant Trust indicate that on the average employees earning benefits worked approximately 1,275 hours per year. Defendants, while contending that the above figure is low and that an upward adjustment is warranted, introduced no evidence establishing the average number of hours worked per year by pensioners (employees receiving benefits) during the entire course of their participation in defendant Trust. Defendants did introduce evidence indicating that under various measures, i.e., high 3 years out

of last 5 years worked — high 5 years — high 3 years, the average hours worked per year by pensioners were, respectively 1,540 hours, 1,934 hours and 2,001 hours. However it is impossible for the court to determine whether the above figures fairly and accurately mirror the average number of hours worked by pensioners over the entire course of their participation in defendant Trust and, therefore, the court declines to adopt them. A valid and reliable approximation of the average hours worked per year by employees receiving benefits is 1,500 hours (1,275 hours as modified by an upward adjustment of approximately 18%).

28. Under certain assumptions regarding the number of years of credit service accrued by participants, a $26.00 monthly benefit factor would have produced the following approximate average monthly (and corresponding yearly) benefits:

	Assumes Base Rate	Assumes Max. Rate	Assumes Avg. Rate
(June 15, 1970)	$6,810.00	$7,605.00	$7,065.00
(October 1, 1970)	$6,892.50	$7,680.00	$7,140.00
(May 1, 1971)	$7,492.50	$8,325.00	$7,685.00
(August 1, 1971)	$7,567.50	$8,392.50	$7,845.00
(May 1, 1972)	$8,242.50	$9,217.50	$8,550.00
(May 1, 1973)	$8,917.50	$9,892.50	$9,210.00

29. The benefit level adopted by defendant Trustees in 1970, in combination with Social Security benefits, resulted in the following income replacement ratios (assuming maximum, pre-retirement hourly wage rates):

(June 15, 1970)	110%
(October 1, 1970)	109%
(May 1, 1971)	105%
(August 1, 1971)	104%
(May 1, 1972)	99%
(May 1, 1973)	98%
(1974)	91%

30. The monthly benefit factor of $26.00, in combination with Social Security benefits, would have resulted in the following approximate income replacement rates (assuming 15 years of credited service accrued and maximum pre-retirement hourly wage rates):

(June 15, 1970)	80%
(October 1, 1970)	79%
(May 1, 1971)	75%
(August 1, 1971)	74%
(May 1, 1972)	72%
(May 1, 1973)	67%
(1974)	69%

31. The desired purpose of private pension systems is to provide, in combination with other sources of retirement income, retirees with sufficient income to maintain their pre-retirement standard of living during retirement.

32. Because of changes in tax liabilities and consumption patterns, the income required by a retiree to maintain his pre-retirement standard of living is less than 100% of his gross pre-retirement earnings. Generally, a replacement ratio of 60% to 80% of pre-retirement gross earnings will enable a retiree to maintain his pre-retirement standard of living.

33. In calculating the income replacement ratio, the amount of social security benefits which a retiree is receiving or will receive when he reaches retirement age (early or normal) is properly considered.

34. In determining the income replacement ratio, unemployment benefits, fringe benefits and wages from employment with other than a participating employer, i.e., an employer making contributions into defendant Trust, are not to be considered as pre-retirement income. Only actual wages earned by the retiree during the course of his employment with a participating employer are properly considered.

35. The normal work pattern for construction laborers covered by defendant Trust results in a very high rate of employee terminations from the industry and from employment covered by defendant Trust.

36. The level of termination from covered work is extremely high among construction laborers as compared to workers in other industries and as compared to other job classifications within the construction industry.

37. The predominant reasons for the high level of termination from covered work among construction laborers are:

(a) the dependency of the construction industry upon general economic conditions;

(b) the physical severity of construction laborer work;

(c) the high rate of disability among construction laborers;

(d) the existence of low entry-level barriers; and,

(e) the movement of some construction laborers to more highly skilled trades.

38. Because the primary reasons for the high level of job termination among laborers are unrelated to pension benefits or any expectation thereof, an increase in pension benefits would not provide any significant incentive to laborers to remain in the industry for 15 years or more nor significantly reduce the high turnover rate among laborers.

39. While an increase in the benefit level may have provided some incentive to laborers to remain in the industry, the $32.40 monthly benefit factor (and the corresponding 176% increase in the average monthly benefit paid) adopted by defendant Trustees and the resultant income replacement ratios far exceeded the recognized standards governing income replacement and were excessive, unwarranted and incongruous with the purposes underlying a private pension plan.

40. The purported goal of defendant Trustees to reduce employee turnover in the 10- to 14-year employee category is directly at odds with and contradictory of the conclusion of the actuarial consultant to defendant Trust, to wit, that the higher monthly benefit factor (and corresponding monthly benefit payments) eventually adopted by defendant Trustees could be maintained only if the termination rate in the 10- to 14-year employee category remained constant.

41. Defendant Trust is a separate and distinct entity from defendant Union.

42. Defendant Trustees are comprised of individuals selected by the collective bargaining parties, half of whom are selected by defendant Union.

43. The adoption and promulgation of eligibilty requirement and benefit levels were within the exclusive domain and power of defendant Trustees. Eligibility requirements

and benefit levels were not mandated by the collective bargaining parties nor were those eligibility requirements and benefit levels adopted by defendant Trustees subject to ratification by defendant Union.

44. No evidence was introduced to show that defendant Union in any way interfered with, or conspired to interfere with, the independent determinations and judgments of defendant Trustees.

45. No evidence was introduced to show that employees who had forfeited their rights to receive pension benefits lodged a complaint with or sought assistance from defendant Union regarding defendant Trust's retention of the 15-year credited service.

46. Assuming that the employees had lodged a complaint with or had sought assistance from defendant Union regarding the 15-year credited service requirement, no evidence was introduced to show that defendant Union did not perform all duties required of it.

47. No evidence was introduced to show that the employees who had forfeited their rights to pension benefits utilized defendant Union's internal grievance procedure.

Any finding of fact which may be deemed a conclusion of law is incorporated into the Conclusions of Law section below, and any conclusion of Law which may be deemed a finding of act is incorporated into the Findings of Fact section above.

CONCLUSIONS OF LAW

1. 29 U.S.C. Section 186(c)(5) imposes traditional fiduciary duties upon trustees of an employee trust and requires that such a trust be operated for the "sole and exclusive benefit" of its participants. *Hurn v. Retirement*

Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, 703 F.2d 386 (9th Cir. 1983); *Ponce v. Construction Laborers Pension Trust for Southern California*, 628 F.2d 537 (9th Cir. 1980); 29 U.S.C. Section 186(c)(5).

2. The primary purpose of 29 U.S.C. Section 186(c)(5) is to insure that "as many intended employees as is economically possible" are awarded pension benefits. *Ponce*, 628 F.2d at 543.

3. A trust is deemed to be "structurally deficient" when it arbitrarily and for no reasonable purpose excludes a large number or participants from receiving pension benefits. *Hurn*, 703 F.2d 386; *Ponce*, 628 F.2d 537; *Burroughs v. Board of Trustees of the Pension Trust Fund for Operating Engineers*, 542 F.2d 1128 (9th Cir. 1976).

4. A trust which is structurally deficient does not operate nor inure to the "sole and exclusive benefit" of all employees. *Hurn*, 703 F.2d 386; *Ponce*, 628 F.2d at 543; *Burroughs*, 542 F.2d at 1131.

5. Because the instant eligibility requirements and benefit levels were adopted and established solely by defendant Trustees and were neither mandated by nor subject to ratification by the collective bargaining parties, the court possesses jurisdiction pursuant to 29 U.S.C. Section 186(e) to review defendant Trust for purposes of determining whether a structural defect exists. *Hurn*, 703 F.2d at 391; 29 U.S.C. Section 186(e).

6. The instant issue is whether the decision of defendant Trustees in 1970 to retain the 15-year credited service requirement constituted a structural defect in violation of 29 U.S.C. Section 186(c)(5). *Ponce*, 628 F.2d at 544.

7. Initially, the burden of proof rests with plaintiffs to demonstrate that defendant Trust's 15-year credited service

requirement excluded an unusually high percentage of participants from receiving pension benefits. *Ponce*, 628 F.2d at 543.

8. Defendant Trust's 15-year credited services requirement excluded approximately 94.3% of all participants from receiving pension benefits. In comparison to the average national forfeiture rate (92.5) and on its face, an exclusion rate of 94.3% was unusually high.

9. Plaintiffs having met their initial burden of proof, the burden shifts to defendant Trustees to demonstrate that the decision to retain the 15-year credited service requirement in 1970 was based upon some reasonable purpose or objective. *Hurn*, 703 F.2d 383; *Ponce*, 718 F.2d at 543.

10. In determining the reasonableness of defendant Trustee's decision, the fact that in 1970 defendant Trustees chose to increase the then-existing benefit level must be considered. *Ponce*, 628 F.2d at 544.

11. In light of both the projected income replacement ratios which would have resulted from a monthly benefit factor of $26.00 and the income replacement ratios actually produced by the monthly benefit factor adopted by defendant Trustees in 1970, the level of benefits adopted by defendant Trustees in 1970 was unusually high and excessive.

12. The Court having concluded that the 15-year credited service requirement excluded an unusually high percentage of participants and that the benefit level adopted by defendant Trustees in 1970 was excessive, the burden rests with defendant Trustees to demonstrate "a substantial and verifiable justification" for their 1970 decision. *Ponce*, 628 F.2d at 544.

13. Defendant Trustees have advanced the following three reasons in support of their decision in 1970 to increase

the benefit level while maintaining the 15-year credited service requirement:

> (a) defendant Trustees' belief that employees who had accrued less than 15 years of credited service were not entitled to pension benefits;
>
> (b) defendant Trustees' goal of providing sufficient income to pensioners to enable them to retire in comfort; and,
>
> (c) defendant Trustees' goal of providing sufficient incentive to qualified employees in order to reduce employee turnover.

14. Defendant Trustees' belief that the only employees deserving of pension benefits were those who had accrued 15 years of credited service does not constitute a reasonable basis or justification for their 1970 decision.

15. Defendant Trustees' goal of providing sufficient income to pensioners in order to enable them to retire in comfort does not constitute a reasonable basis or justification for their 1970 decision. While the evidence indicates that some increase in the benefit level was warranted, the evidence also demonstrates that the benefit level adopted by defendant Trustees was "more" than adequate and clearly excessive, usually providing pensioners with post-retirement income in excess of 100% of their pre-retirement income.

16. "[A]lthough an increase in benefits to the upper range of the national average may arguably provide some incentive to employees to continue their participation in a pension plan, an additional increase in benefits to a point well beyond the upper range of the national average will do little, if anything, to further strengthen the incentive. In short, increasing pension benefits in the hope of enticing employees to continue in their employment reaches a point

of diminishing returns . . . At some point, it is arbitrary and capricious for trustees to keep increasing pension benefits in the hope of encouraging employees to remain in the pension plan in future years." *Ponce*, 628 F.2d at 544.

17. Defendant Trustees' goal of providing sufficient incentive to qualified employees in order to reduce employee turnover does not constitute a reasonable basis or justification for their 1970 decision. The evidence adduced simply does not support defendants' contention.

18. The reasons advanced by defendant Trustees in support of their decision in 1970 to increase the benefit level while retaining the 15 year credited service requirement, singularly and collectively, fall short of establishing "a substantial and verifiable justification" for defendant Trustees' decision and fail to demonstrate that said decision was based upon any reasonable goal or objective. *Hurn*, 703 F.2d 386; *Ponce*, 628 F.2d 537.

19. "Absent a substantial and verifiable justification, it is arbitrary and capricious for trustees both to maintain a vesting requirement with a high exclusion rate and at the same time to pay an unsually high level of benefits." *Ponce*, 718 F.2d at 544.

20. Defendant Trustees' decision in 1970 to maintain the 15-year credited service requirement and to increase the benefit level was arbitrary and capricious and constituted a structural defect violative of 29 U.S.C. §186(c)(5). *Hurn*, 703 F.2d 386; *Ponce*, 628 F2d 537; *Burroughs*, 542 F.2d 1128.

21. Defendant Trust and Trustees are liable for a violation of 29 U.S.C. §186(c)(5).

22. No evidence has been introduced which would support a finding that defendant Union violated 29 U.S.C.

§186(c)(5) and, therefore, no liability attaches to said defendant.

23. A labor organization owes a duty of fair representation to its members. Said duty requires the labor organization to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967).

24. The court possess jurisdiction over plaintiffs' breach of fair representation claim pursuant to 29 U.S.C. §186(c) and 28 U.S.C. §1331.

25. Defendant Union has not breached its duty of fair representation to plaintiffs.

APPENDIX D

Augustine PONCE et al,
Plaintiffs-Appellants,
v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA et al.
Defendants-Appellees.

Tom GILCHRIST,
Plaintiff-Appellant,
v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA et al.,
Defendants-Appellees.

Nos. 79-3109, 79-3274

United States Court of Appeals,
Ninth Circuit
Argued and Submitted March 4, 1980
Decided Sept. 22, 1980.

Bruce K. Miller, Los Angeles, Cal., for plaintiffs-appellants.

Kenneth J. Sackman, Beverly Hills, Cal., Lionel Richman, Los Angeles, Cal., argued, for defendants-appellees; James Wolf, Los Angeles, Cal., on brief.

Appeals from the United States District Court for the Central District of California.

Before PECK*, ANDERSON and FERGUSON, Circuit Judges.

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* The Honorable John W. Peck, Senior United States Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

PECK, Circuit Judge.

The two cases now before the Court have been consolidated for disposition. The plaintiffs in these cases challenge as "arbitrary and capricious" certain vesting requirements (especially, the "15-year credited service" requirement and the "break-in-service" rule) of the Construction Laborers Pension Trust for Southern California. Plaintiffs brought these appeals after the district court had entered summary judgments in favor of defendants.

INTRODUCTION

The Construction Laborers Pension Trust for Southern California (Trust; Pension Trust) is an irrevocable trust fund that was established on June 15, 1962, pursuant to an agreement and declaration of trust among the Southern California District Council of Laborers, certain affiliated locals, and the contractors with whom the District Council engaged in collective bargaining. For the purposes of this appeal, the Trust is governed by the requirements of section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5). In general terms that section requires that a trust fund be operated for the "sole and exclusive benefit" of employees of contributing employers. The declared purpose of the Trust is the payment of retirement and disability pension benefits to employees of employers who are parties to the Trust and to the dependents of those employees. The Trust derives its revenues exclusively from the contributions that are made by each member employer for each hour that is worked by his employees. In other words, the Trust is exclusively employer-funded.

By resolution dated October 16, 1962, the Board of Trustees of the Pension Trust was empowered to promulgate rules and regulations to govern the distribution of pension benefits that are to be paid by the Trust. On December 27, 1962, the Board of Trustees, acting in accordance with its authority, adopted a pension plan which set out various requirements for eligibility to receive pension benefits. At all times, from the initial adoption of the pension plan in December 1962 through the close of calendar year 1975, the eligibility requirements for benefits under the Trust included the following two conditions:

(a) The 15-Year Credited Service Requirement.

The minimum period of work in employment covered by the Plan required to be completed by an employee claiming any kind of pension is 15 years. In addition, the minimum period of employment required to secure a vested or a non-forfeitable right to a deferred pension benefit is similarly 15 years;

(b) The Break-in-Service Rule.

Any employee who had accumulated less than 15 years of employment covered by the Plan suffers a complete cancellation of credit for such employment (subject to certain exceptions not at issue in the present action) in the event that he fails to complete at least 300 hours of work in covered employment in each of two consecutive years.

The Ponce Case

Plaintiffs in the Ponce case are eighteen retired or disabled construction workers who completed at least ten

years of employment that are recognized as credited service under the Pension Trust. (Each plaintiff completed his last period of work in covered employment before January 1, 1976.) Plaintiffs applied to the Trust for either normal retirement pensions, early retirement pensions, or disability pensions; however, all of their applications were denied by the defendant Board of Trustees. The sole basis for such denials was the Trustees' conclusion that plaintiffs had failed to satisfy the Trust's 15year minimum service requirement, either because plaintiffs had failed to complete 15 years of covered employment or because some portion of plaintiffs' employment was not recognized due to the operation of the break in service rule.

The first contention of the Ponce plaintiffs focuses on the 1970 decision of the Board of Trustees to increase the monthly benefit level of the Trust from $13.75 per month for each year of credited service to $22.40 per month for each year of credited service. In essence, plaintiffs contend that this decision of the Trustees to more than double the monthly benefits was arbitrary and capricious, and that the Trustees should have disbursed the pension funds by including more plan participants in the class of beneficiaries. According to plaintiffs, the Trustees could have realized such inclusion by lowering the number of years of credited service that is required for pension vesting. In their second contention, the Ponce plaintiffs argue that the break-in-service rule is not related to any legitimate trust purpose because it applies to a negligible percentage of otherwise eligible plan participants.

The Gilchrist Case

Plaintiff Thomas Gilchrist was a construction laborer who had worked in Southern California from 1942 through

1973, at which time he became disabled. From 1952 through 1973, Gilchrist's work was continuous and produced 13 and 8/12 years of service that was credited toward his entitlement to a pension from the Pension Trust. In addition to such credited service, Gilchrist performed an additional 2 and 10/12 years of construction work during the period from 1942 to 1949. In February of 1972, Gilchrist applied to the Pension Trust for an early retirement pension; however, his application was denied by the Board of Trustees on the ground that Gilchrist had failed to satisfy the 15-year minimum service requirement. The Trustees concluded that Gilchrist's 2 and 10/12 years of service between 1942 and 1949 could not be considered for purposes of the minimum service requirement because Gilchrist had failed to earn any pension credit during the years 1950 and 1951. Under the terms of the Trust's break-in-service rule, the absence of pension credit for two consecutive years required automatic cancellation of any previous credits Gilchrist might have otherwise earned. Such cancellation left Gilchrist with only 13 and 8/12 years of credited service, a period that did not satisfy the 15-year minimum service requirement. Gilchrist attacks as arbitrary and capricious the application of the break-in-service rule to his construction work during 1942 and 1949. (As indicated above, the break in service rule was adopted ty the Board of Trustees in 1962.) Gilchrist contends that the application of the break-in-service rule to his work record from 1942 to 1951, a period when neither he nor any other worker had notice of the rule's requirements, was arbitrary, capricious, and not rationally related to any legitimate trust purpose.

THE STANDARD OF REVIEW

Initially, we note that the mandatory vesting provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., are not applicable to either of the cases now on appeal. In regard to the contentions of the Ponce plaintiffs, the provisions of ERISA protect only the pension rights of workers who were working at the beginning of calendar year 1976, the effective date of the Act. In other words, Congress chose not to make ERISA's minimum eligibility standards retroactive. See 29 U.S.C. § 1061(b)(2). See, e.g., *Wilson v. Board of Trustees*, 564 F.2d 1299, 1302 (9th Cir. 1977). As previously noted, each of the plaintiffs in Ponce completed his last period of work in covered employment before January 1, 1976. In regard to the contentions of plaintiff Gilchrist, ERISA does not require pension plans to give credit for service that was completed prior to the inception of the plan. Further, ERISA specifically permits a pension plan to give effect to a break in service that occurred prior to January 1, 1976. See 29 U.S.C. § 1053(b)(1)(C): 29 U.S.C. § 1053(b)(1)(F). See, e.g., *Wilson, supra*, 564 F.2d at 1302.

Although the provisions of ERISA are not applicable to the present cases, the actions of the defendant Board of Trustees are nonetheless subject to judicial review pursuant to the provisions of section 302(c)(5) of the Taft-Hartley Act. Section 302 of the Act, 29 U.S.C. § 186, prohibits employers and their representatives from making payments of money "or other thing of value" to employee representatives; however, section 302(c)(5) of the Act sets forth an exception to this general prohibition in relation to employee welfare or pension plans. Section 302(c)(5)

provides that the provisions of Section 302 are not applicable,

> with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents).

29 U.S.C. § 186(c)(5)(emphasis added). Under section 302(e) of the Act, 29 U.S.C. § 186(e), the federal district courts have jurisdiction "to restrain violations of this section."

The language of section 302(c)(5) (trust funds shall be operated ". . . for the sole and exclusive benefit of employees . . ."), and the standard of judicial review to which such language gives rise, have been the subject of interpretation Many courts have drawn a distinction between "structural" defects in a trust fund, on the one hand, and questions involving "the day-to-day fiduciary administration" of a trust fund on the other. These courts have concluded that the "sole and exclusive benefit" language of section 302(c)(5) allows judicial review only of so called "structural" defects. See *Wilson v. Board of Trustees*, 564 F.2d 1299, 1300 (9th Cir. 1977); *Burroughs v. Board of Trustees*, 542 F.2d 1128, 1130 (9th Cir. 1976), cert denied, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977); *Alvares v. Erickson* 514 F.2d 156, 165 (9th Cir.), cert. denied, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975); *Mosley v. National Maritime Union Pension Plan*, 438 F.Supp. 413, 418 (E.D.N.Y. 1977); *Insley v. Joyce*, 330 F.Supp. 1228, 1234 (N.D.Ill.1971). Other courts have

suggested that allegations of criminal intent or willfulness are a prerequisite to jurisdiction under the section. Compare *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 425 (lst Cir. 1968) with *Alvares v. Erickson, supra.* Despite these at-times conflicting interpretations of the language of section 302(c)(5), it is now settled, at least in this Circuit, that jurisdiction exists under the section if a complaint properly alleges that pension trustees, acting under the authority of the trust fund, "arbitrarily and capriciously" denied pensions to employees. Such arbitrary and capricious conduct is deemed not to be "for the sole and exclusive benefit of the employees," and is therefore structurally deficient. See *Tomlin v. Board of Trustees*, 586 F.2d 148, 149 (9th Cir. 1978); *Wilson, supra; Burroughs, supra; Giler v. Board of Sheet Metal Workers of Southern California*, 509 F.2d 848, 849 (9th Cir. 1975); *Lee v. Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1972); *Roark v. Lewis*, 401 F.2d 425, 426 (D.C.Cir. 1968); *Mosley, supra.*

Consistent with this limited standard of review under section 302(c)(5), courts have given wide discretion to trustees, "short of plainly unjust measures . . . ," to decide questions relating to pension eligibility. *Sailer v. Retirement Fund Trust*, 599 F.2d 913, 914 (9th Cir. 1979). Generally speaking, trustees are knowledgeable of the details of a trust fund (both its purpose and its operation), and thus they are in a position to make prudent judgments concerning participant eligibility. Courts are extremely reluctant to substitute their judgments for the judgments of the trustees, and will do so only if the actions of the trustees are not grounded on any reasonable basis. The Court of Appeals for the District of Columbia stated the following in *Roark v. Lewis, supra*, 401F.2d 425, 429:

> The court is fully cognizant of the internal pressures exerted on the trustees: the size of the pie is fixed and variations can be achieved only by changing the size or the number of the slices. There is no camouflaged design on the part of the court to second-guess the discretionary judgments of the trustees . . . It is for the trustees, not judges, to choose between various reasonable alternatives.

See also, *Tomlin*, supra; *Giler*, supra; *Lee*, supra.

THE PONCE CASE

The Break-in-Service Rule

Plaintiffs in the *Ponce* case attack the break in service rule on the grounds that the rule serves no legitimate trust purpose because it does not apply to a significantly large number of otherwise eligible plan participants. In other words, plaintiffs reason that the rule, which denies pension benefits to only a few plan participants, does not substantially contribute to the actuarial soundness of the Trust. In the light of this reasoning, plaintiffs conclude that the rule should therefore not be applied to *any* of the plan participants. We find this reasoning of plaintiffs to be flawed in a number of respects. First, even given the already limited standard of review under Section 302(c)(5), courts will be less concerned about a rule that excludes a low percentage of plan participants than about a rule that excludes a high percentage of such participants. The protections of section 302(c)(5) do not sound in equal protection principles which grant redress to a few individuals who have been unfairly singled out of a group to bear a particular burden. Rather, the protections of the section are primarily designed to insure that the trustees of

a pension plan will award benefits to "as many intended employees as it economically possible." *Gaydosh v. Lewis*, 410 F.2d 262, 266 (D.C.Cir.1969). Accordingly, assuming a legitimate trust purpose and assuming an absence of bad faith on the part of the trustees, a vesting requirement that excludes only a few eligible plan participants will not be at odds with the basic goal of Section 302(c)(5).

Second, the fact that a vesting requirement applies to a low percentage of otherwise eligible employees does not in any way tend to prove that the requirement is arbitrary and capricious. Most vesting requirements are adopted in order to encourage employees to conform their work patterns to the legitimate expectations of employers. Specifically, a break-in-service rule is intended to promote an employer's legitimate interest in the continuous employment of his employees. *See, e.g., Wilson v. Board of Trustees, supra*, 564 F.2d 1299, 1301-1302. Thus, the fact that only a few employees are affected by a break-in-service rule tends to prove only (if it proves anything) that the rule is successful in achieving the legitimate goal of continuous employment. Finally, case law indicates that the actuarial soundness of a pension plan is influenced to an appreciable degree by the exclusion of even one otherwise eligible plan participant. For example, in *Wilson v. Board of Trustees, supra*, 564 F.2d 1299, 1302, this Circuit held that the denial of benefits to one plan participant "undoubtedly [made] funds available for other beneficiaries of the Fund . . . ."

We have previously concluded that a "break-in [service] rule is not by itself arbitrary and capricious . . . ." *Burroughs v. Board of Trustees, supra*, 564 F.2d 1299, 1300. We now conclude that such rule is not rendered arbitrary and capricious solely because in its application it excludes a negligible percentage of otherwise eligible employees. The

district court correctly granted summary judgment to defendants denying the contentions of the *Ponce* plaintiffs that related to the break in service rule.

15-Year Credited Service Requirement

Plaintiffs in the *Ponce* case make a more substantial argument as to the 15-year credited service requirement. In support of their contention that the Trust Fund excludes an excessively high percentage of plan participants, plaintiffs point to the fact that from the inception of the Trust in 1962 through 1974 less than four percent of the plan participants qualified for and began receiving pension benefits. (Defendants do not dispute this percentage.) Plaintiffs further allege that this exclusion rate compares unfavorably to the "Interim Report of Activities of Private Welfare and Pension Plan Study," Subcommittee on Labor, U.S. Senate Committee on Labor and Public Welfare, 1971. That survey indicates that, on a national average, the percentage of workers who qualify for benefits from pension plans that require eleven years or more of work as a condition of eligibility is eight percent.

This Court will not engage in judicial line drawing for the purpose of setting precise guidelines for trsutees to use in determining wht is an acceptable rate of participant-exclusion. Such a course would improperly interfere with the discretion that the courts have placed in the hands of the trustees. *See, e.g., Sailer v. Retirement Fund Trust, supra,* 599 F.2d 913, 914; *Roark v. Lewis, supra,* 401 F.2d 425, 429. However, the primary purpose of section 302(c)(5) is to insure that pension benefits are awarded to "as many intended employees as is economically possible." *Gaydosh v. Lewis, supra,* 410 F.2d 262, 266. Further, this Court has

held in *Burroughs v. Board of Trustees, supra,* 542 F.2d 1128, 1131 that:

> A structural defect is present when a pension plan excludes a sizeable number of union members with no reasonable purpose behind their exclusion, thus failing to satisfy the requirement that the fund shall be for the "sole and exclusive benefit" of all employees. *See Insley v. Joyce,* 330 F.Supp. 1228, 1233 (D.C.Ill. 1971).

Accordingly, we now hold that when a vesting requirement is shown to exclude an unusually high percentage of plan participants, the burden shifts to the trustees to show the reasonableness of the requirement. *Cv. Roark v. Lewis, supra,* 401 F.2d425, 428.

In the context of our present review of the district court's grant of summary judgment in favor of defendants, we find that the record does not indicate that defendants are entitled to such judgment as a matter of law. Defendants have not conclusively carried their burden of proof and established a sufficient reason for their decision to maintain the unusually high exclusion rate that is suggested by plaintiffs' evidence. The trsutees have argued to this Court that their 1970 decision to more than double the then-existing level of benefits was reasonably grounded on their belief that the increase in benefits would serve to eliminate the high drop-out rate among construction workers. However, we find this justification to be speculative, at least as far as it is supported by the present record. There is evidence to suggest that most construction workers leave their jobs after only relatively brief periods of employments. Work in the construction industry is at times scarce due to the cyclical and seasonal fluctuations that occur within the industry. Further, construction work is strenuous, and the

incidence of construction-related accidents is high. In light of these factors, it is speculative whether an increase in pension benefits will provide any meaningful incentive to construction workers to continue in their employment for a period that is as long as 15 years. The trustees, who shoulder the burden of proof, have not produced evidence to document the reasonableness of their alleged belief that a significant increase in pension benefits would help reduce the high drop-out rate among construction workers.

Further, although an increase in benefits to the upper range of the national average may arguably provide some incentive to employees to continue their participation in a pension plan, an additional increase in benefits to a point well beyond the upper range of the national average will do little, if anything, to further strengthen the incentive. In short, increasing pension benefits in the hope of enticing employees to continue in their employment reaches a point of diminishing returns. As noted above, the primary purpose of Section 302(c)(5) is to insure that pension benefits are awarded to as many employees as is economically possible. At some point, it is arbitrary and capricious for trustees to keep increasing pension benefits in the hope of encouraging employees to remain in the pension plan in future years. At this point, trustees should reduce the vesting requirements and immediately and directly bring more employees into the class of eligible participants. Such result can be achieved by lowering the number of years credited service that is required for vesting.

In reaching our conclusion as to the credited service requirement, we note that the precise question before the Court does not pertain simply to the reasonableness of a 15-year service requirement that excludes 96 percent of the plan participants. Rather, the question now before us

pertains to the reasonableness of such requirement, in the light of the fact that in 1970 the trustees chose to maintain the 15 year requirement and more than double the then-existing level of benefits. Trustees can distribute accumulated pension funds either by increasing the benefit levels or by increasing the number of beneficiaries. It is true that, on its face, a 15-year credited service requirement is valid. See e.g., *Tomlin v. Board of Trustees*, 586 F.2d 148 (9th Cir. 1978). It is also true that trustees have some legitimate interest in making pension benefits attactive to covered employees in order to encourage their continued participation. However, the reasonableness of maintaining an exclusionary requirement diminishes as the level of benefits to the included beneficiaries increases. In other words, absent a substantial and verifale justification, it is arbitrary and capricious for trustees both to maintain a vesting requirement with a high exclusion rate and at the same time to pay an unusually high level of benefits.

The parties in the Ponce case dispute at considerable length the question of whether the pension trustees in 1970 raised the level of benefits to an extraordinarily high level. For example, plaintiffs contend that after the 1970 increase some beneficiaries of the Trust received benefits that, when combined with their social security benefits, exceeded 140 percent of their pre-retirement monthly wages. Such evidence of plaintiffs raises factual questions that are central to the resolution of this case. We vacate the district court's summary judgment in favor of defendants regarding the 15-year credited service requirement. On remand, the district court must determine, after factual findings are made, whether it was reasonable for the trustees to maintain a vesting requirement that excluded 96 percent of the plan participants. The reasonableness of such action must be determined in the light of the level of benefits that the

trustees chose to pay in 1970. If the court concludes that, given the high level of benefits, the exclusionary impact of the 15 year credited service requirement was unreasonable, the Court should then determine if any of the plaintiffs herein would have been entitled to pensions if the trustees had reasonably modified the credited service requirement in 1970. In reaching its conclusions, the district court need not consider the impact that inflation has had on the benefit level over the past decade. The fact that high inflation over an extended period may reduce an exhorbitant level of benefits to a reasonable level of benefits does not mitigate the injury that is sustained by an excluded participant in the year that the unreasonable benefits are declared.

THE GILCHRIST CASE

Plaintiff Gilchrist attacks as arbitrary and capricious the application of the break-in-service rule to his work record from 1942 to 1951, a period when neither he nor any other worker had notice of the rule's requirements. (Of course, the reason that plaintiff did not have notice of the rule's requirements during 1942 through 1951 is that the rule was not adopted until 1962). Plaintiff cites the case of *Burroughs v. Board of Trustees, supra,* 542 F.2d 1128 (9th Cir. 1976), cert. denied, 429 U.S.C 1096, 97 S.Ct 1113, 51 L.ed2d 543 (1977); however, plaintiff's reliance on the Burroughs case is misplaced. In Burroughs, this Court prohibited the application of a break in service rule to a participating employee's service that had been performed prior to a pension plan's inception. Therein, the Court concluded that the trustees had acted in a fundamentally unfair manner when they had failed to provide the employee with notice after the plan's inception of the break-in-service rule. In other words, in Burroughs, the

employee's past service had been performed prior the inception of the pension plan, but his break in service had occurred after the inception of the plan when the employee would have had a present ability to conform his work pattern to the rule's requirements, if he had known them. Plaintiff argues that Burroughs requires that plan participants have notice of all eligibility rules, even those rules that apply to service that is entirely preformed before the plan is adopted. If plaintiff's theory was accepted, there could be no rules applied to past service credit because there could be no notice of what rules might be adopted by a pension plan not yet in existence.

CONCLUSION

In regard to the Ponce case, the judgment of the district court in favor of defendants is affirmed in part and vacated in part. The case is remanded to the district court for further proceedings consistent with his opinion.

In regard to the Gilchrist case, the judgment of the district court in favor of defendants is affirmed.

J. BLAINE ANDERSON, Circuit Judge, concurring:

I agree that we must affirm Gilchrist, and reverse in part with respect to Ponce. However, the language on page 11, commencing at line 7 from the top, "in other words, absent a substantial and verifiable justification, it is arbitrary and capricious for trustees both to maintian a vesting requirement with a high exclusion rate and at the same time to pay an unusually high level of benefits." causes me some concern since it is capable of being read too restrictively. I submit it should not be so read. The trustees are dealing with a unique laboring force and are entitled to consider the many factors which render it unique when making their

judgments in carrying out their trust responsibilities. The language I have quoted should not be read to foreclose, on remand, consideration of facts and circumstances pertinent or unique to this particular trust, the industry, and its working force. To so read it would be unwarranted, and would impermissibly restict the broad discretion properly vested in Taft-Hartley Action pension Trustees. See, e.g., *Tomlin (Streeter) v. Board of Trustees of Construction Laborers*, 586 F.2d 148, 151 (9th Cir. 1978).

Upon the understanding that the language "absent a substantial and verifiable justification" should not be read and applied restrictively in further proceedings below, I concur in Judge Peck's opinion.

APPENDIX E

29 U.S.C Section 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. Section 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

29 U.S.C. Section 186

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents); *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement

with the employer, and employees are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their faiure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;

29 U.S.C. Section 186

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.